Supreme Court of the United States

OCTOBER TERM, 1957

No. 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASATLANTICA, also known as SPANISH LINE, and GARCIA AND DIAZ, INC. and QUIN LUMBER CO., INC.,

Respondents.

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, *AMICUS CURIAE*

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement

This brief is filed by The Government of the United Kingdom of Great Britain and Northern Ireland as *amicus curiae,* because the legal principles and practical consequences involved in this case are of paramount importance to all maritime nations, including the United Kingdom, whose vessels touch the territorial waters of the United

States of America and from time to time tie up at piers within those waters in the course of their movements in international trade.

This Honorable Court, in *Lauritzen* v. *Larsen*, 345 U. S. 571, largely clarified the scope of the Jones Act in its application to foreign seamen, emphasized the fundamental and far-reaching considerations affecting and controlling international carriage by sea as opposed to the "fortuitous" and transitory factors involved, and set forth certain factors which, alone or in combination, influence the choice of law to govern a maritime tort claim. In that case, this Court held that the fact that a foreign seaman had signed on a foreign ship at a United States port was a "fortuitous" factor which did not require the application of United States Law to a tort occurring in foreign waters. It applied, with impressive emphasis on comity and the practical usage of the sea, the ancient and most universal rule of maritime law—the law of the flag.

Further clarification of the Jones Act and of the applicable maritime law is required by the instant case. Certain points of domestic law having no direct impact on maritime law, and the propriety of procedural matters in the lower courts, are not a proper concern of this brief.

But it does seem appropriate and of the highest importance, and, it is respectfully hoped, of some help to this Honorable Court, that this brief point out the necessity for protecting the free flow of international commerce by sea, of applying in like manner to the instant case those principles of comity and practical usage so lucidly expounded and applied in the *Lauritzen* case.

In the instant case, this Court has been asked to decide that the Jones Act should be applied to the claim of a Spanish seaman employed on a Spanish vessel, injured aboard the vessel in a United States port and treated ashore in the United States, despite there being remedies available under Spanish law and despite the shipping

articles under which the seaman was employed specifically providing that all claims against the employer were to be dealt with under the laws of Spain, in Spain, or before a representative of the Spanish Government.

POINT I

It is just and reasonable for seamen and shipowners to agree that their respective rights and liabilities shall be determined in accordance with the law of their common nationality, the flag of the vessel and the place of the contract—in the instant case a Spanish seaman, a Spanish shipowner, a Spanish ship and Spanish shipping articles incorporating Spanish Law—and both the interests of justice and reasons of comity should sustain the agreement in the instant case.

This Court, in *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462, in discussing the duties of courts in respect to contracts, has said that the reason for the existence of terms and conditions in contracts is immaterial if they have been accepted and agreed upon by the parties. The function and duty of the courts are not to make a new contract for them but "consist simply in enforcing and carrying out the one actually made."

The district court, in the instant case, has found that the contract of employment specifically provided that the parties submitted themselves to the established Spanish laws of Labor and Commerce and agreed that in the event of accident these laws and the Spanish social insurance laws would apply. The district court also found on the evidence that the Spanish law would permit a recovery of maintenance and cure and a pension for life of between 35% and 55% of the seaman's wage with a probability of an increased pension if negligence of the shipowner is established.

It will be recognized that social conditions in Spain, the United States of America, Great Britain and other maritime countries differ greatly as do their wage scales, climate, laws and tastes in food. But it will also be recognized that it is not the function of any nation to force a uniformity of social conditions or laws on other nations. Each individual maritime country, based upon its own economic system, state of social advancement, standard of living and the will of its citizens, has the right to enact legislation setting forth the rights and obligations of its shipowners and its seamen. Attempts by any other country, by legislation or judicial action, to write laws governing the obligations and liabilities of a foreign shipowner to its seamen is a departure from the law of the flag so serious as to warrant this Court's consideration. Although social legislation, and in particular legislation concerning benefits due to seamen injured in the service of their vessel, differs in individual countries, this fact does not give another country the right to impose its standards upon foreign shipowners in their relations with citizens of the country of the vessel's flag. To hold otherwise would almost destroy the historical and prevailing doctrine that questions concerning the internal economy and discipline of a vessel are to be determined by the law of the vessel's flag.

International maritime law is a prime example of the successful obedience by maritime nations in their relations with each other to the old precept, "bear and forbear". As this Court pointedly said in the *Lauritzen* case, at page 582:

> "in dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor shall we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

Basically, just as in the United States, in foreign maritime countries the general international maritime law is supplemented by statutes, codes or regulations and judicial decisions which regulate the relationship between seamen and shipowners. In many such countries the shipowner is required to contribute to compensation funds and to the maintenance of institutions established for the welfare of seamen. In those countries the seamen are, in the event of injury, provided with compensation in amounts related to the nation's social development and scale of living. To compensate an injured seaman on a different scale would be to deprive the shipowner of the benefits of the fund to which he was forced by his government to contribute, force upon him in many cases a double liability, and, in some instances, could result in a financial loss to the seaman.

If the decision of the Court of Appeals in the instant case were to be reversed on the basis of the principle of *lex loci delicti*, applicable to torts on land, one foreign seaman injured in an American port would have substantive rights and a measure of recovery quite different and, generally speaking, a quantum of recovery much in excess of other seamen serving on the same vessel under the same articles who had been injured on the vessel at other than an American port. The interests of justice, as well as the persuasive considerations of comity, require that two foreign seamen signing articles drawn in accordance with the law of their nationality serving on the same vessel of their nation's flag should be equally compensated for the same injury and their recompense measured in accordance with the social standards of the country of their citizenship. The verdict of a New York City jury assessing the damages of an injured Japanese seaman might well exceed the award of a Japanese court by 10 to 1. Obviously, the interests of justice would not be served if one Japanese seaman who had been injured on a vessel of his country's flag while fortuitously in an American port were given this great advantage over a fellow Japanese seaman performing the same services who had been injured in Osaka.

In the instant case, aside from the fact that a Spanish vessel happened to be in United States territory when an injury occurred, there are no American factors or interests involved in the action. It will in no manner affect or limit the rights and liabilities of American seamen or shipowners for this Court to refer the Spanish seaman to his Spanish remedies. In the circumstances that was his and the shipowner's bargain. It is both just and reasonable that this bargain be sustained.

POINT II

The "fortuitous" fact that a vessel is temporarily present in territorial waters of a country other than her flag's when an injury occurs should not affect the historic doctrine that matters involving the internal economy of a vessel are to be determined in accordance with the law of the vessel's flag.

This Court discussed in the *Lauritzen* case, at pp. 583-4, the *lex loci delicti commissi*, as one of the seven factors to be considered and cited *Carr* v. *Fracis Times & Co.* (Eng.) (1902) AC 176-HL, as applying that factor. See also *MacKinnon* v. *Iberia Shipping Co.* (1954) 2 Lloyds Rep. 372, a Scottish case which also cited *Carr* v. *Fracis Times & Co.* But this Court said, at p. 584:

> "the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag."

Moreover in the *Lauritzen* case (345 U. S. at p. 583), this Court recognizes that the principle of *lex loci delicti*, applicable to torts on land, is of limited application to maritime torts because a ship, moving from place to place, is frequently changing "laws". Perhaps, that is the reason for this Court, in reviewing the several factors which

are considered in determining what law applies to a given maritime tort, said (345 U. S. at pp. 585-586):

> "This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. United States *v.* Flores, 289 U. S. 137, 155-159, 77 L. ed. 1086, 1093-1095, 53 S. Ct. 580, and cases cited * * *.
>
> "It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in United States *v.* Flores, supra (289 U. S. at 158), and iterated in Cunard S. S. Co. *v.* Mellon, supra (262 U. S. at 123):
>
> > " 'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . .'
>
> "This was but a repetition of settled American doctrine."

It should also be remembered, in the instant case, that the Jones Act is "primarily at any rate a local statute" (*Kyriakos* v. *Goulandris*, 151 F. 2d 132, 139, *dissenting opinion* of Cir. Ct. Judge Learned Hand) and the clearest and gravest warrant is required before it is substituted for the law of the flag.

Of the seven factors referred to in the *Lauritzen* case "which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim", six factors point directly to the application of Spanish law. The vessel's flag is Spanish. The injured seaman is Spanish. The shipowner is Spanish. The contract of employment was entered into in Spain. The Spanish seaman can present his claim to Spanish representatives here in the United States. While an American forum has perfected jurisdiction over the parties, the connection of the controversy with the United States is slight and involves only the internal economy of a Spanish vessel. The mere existence of one transitory and "fortuitous" fact—that the accident occurred in American waters—should not override all the other and more weighty signposts pointing to Spain. Surely the place of the accident is no less "fortuitous" in the instant case than the place of contract in the *Lauritzen* case.

CONCLUSION

It is respectfully submitted that this Court should affirm the dismissal of the complaint.

Dated, New York, N. Y.,
January 9, 1958.

Respectfully submitted,

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